

STATE OF MICHIGAN
COURT OF APPEALS

DEVICA L. THOMPSON, Personal
Representative of the Estate of JOHN LEE
THOMPSON,

Plaintiff-Appellee-Cross-Appellant,

v

CARROLLTON TOWNSHIP POLICE
DEPARTMENT, JASON ARTHUR HENDRICKS,
MATTHEW TERRY LAUX, JOSHUA ROLL,
STEVE FRESORGER, SAGINAW COUNTY,
SAGINAW COUNTY SHERIFF'S
DEPARTMENT, CHARLES L. BROWN,
CARROLLTON TOWNSHIP, CRAIG OATTEN,
CITY OF ZILWAUKEE, ZILWAUKEE POLICE
DEPARTMENT, BRUCE KING, and TASER
INTERNATIONAL, INC.,

Defendants-Cross-Appellees,

and

JEFFREY BRECHELSBAUER, CARY
ONWELLER, PAUL LAGALO, RICKEY SHAFT,
STUART SCHWEIGERT, and JONATHAN
BROWN,

Defendants-Appellants-Cross-
Appellees.

DEVICA L. THOMPSON, Personal
Representative of the Estate of JOHN LEE
THOMPSON,

Plaintiff-Appellee-Cross-Appellant,

UNPUBLISHED
June 2, 2009

No. 283772
Saginaw Circuit Court
LC No. 03-050008-NO

CARROLLTON TOWNSHIP POLICE
DEPARTMENT, JEFFREY BRECHELSBAUER,
CARY ONWELLER, PAUL LAGALO, RICKEY
SHAFT, STUART SCHWEIGERT, JONATHAN
BROWN, STEVE FRESORGER, JOSHUA ROLL,
SAGINAW COUNTY, SAGINAW COUNTY
SHERIFF'S DEPARTMENT, CHARLES L.
BROWN, CARROLLTON TOWNSHIP, CRAIG
OATTEN, CITY OF ZILWAUKEE, ZILWAUKEE
POLICE DEPARTMENT, BRUCE KING, and
TASER INTERNATIONAL, INC.,

Defendants-Cross-Appellees.

and

JASON ARTHUR HENDRICKS and MATTHEW
TERRY LAUX,

Defendants-Appellants-Cross-
Appellees.

Before: Borrello, P.J., and Murphy and M.J. Kelly, JJ.

PER CURIAM.

In these consolidated appeals, we review multiple orders entered by the trial court in this action arising out of the death of John Lee Thompson, allegedly caused by improper conduct and actions taken by police officers employed by different jurisdictions. We affirm in part, reverse in part, and remand for entry of judgment in favor of all defendants.

Numerous officers were involved in: responding to an altercation involving Thompson at an apartment complex; subduing Thompson at the scene by the use of force, pepper spray, and a taser; placing him into custody and transporting him to the county jail; again subduing Thompson at the jail's sallyport by the use of force, pepper spray, and a taser; jailing and placing Thompson in an administrative segregation cell; and responding to Thompson when his breathing became labored in the jail cell, later culminating in his death. Plaintiff, the personal representative of Thompson's estate, filed suit under various theories of liability. The action was

brought against the individual officers who allegedly engaged Thompson during the series of events (Hendricks, Laux, and Fresorger at apartment complex and jail sallyport, and Brechelsbauer, Onweller, Lagalo, Shaft, Schweigert, Jonathan Brown, and Roll at sallyport only).¹ Also sued were the three governmental bodies employing the officers (Zilwaukee, Carrollton Township, and Saginaw County), their respective police departments, and the police chiefs and sheriff from those jurisdictions (King – Zilwaukee, Oatten – Carrollton Township, and Charles Brown – Saginaw County). Plaintiff additionally sued the taser manufacturer, Taser International, Inc. (TII).²

The claims pursued by plaintiff were gross negligence, state law assault and battery, use of excessive force in violation of the Fourth Amendment brought pursuant to 42 USC 1983, deprivation of constitutional privacy rights in stripping Thompson while in the jail cell, deliberate indifference to Thompson's medical needs in violation of the Eighth and Fourteenth Amendments brought pursuant to 42 USC 1983, civil conspiracy, deprivation of various constitutional rights relative to hiring, training, and supervision failures brought pursuant to 42 USC 1983, and products liability, with an accompanying claim that TII failed to properly train officers and law enforcement agencies in taser use.

The trial court summarily dismissed the action against TII, and it granted summary disposition in favor of the remaining defendants, except with respect to excessive force and assault and battery claims relative to the actions of certain officers at the jail's sallyport pertaining to the use of pepper spray and the initial deployment of the taser. In Docket Number 283772, the assault and battery and excessive force claims against the county officers that survived summary disposition are being appealed. In Docket Number 283785, the assault and battery and excessive force claims against officers Laux and Hendricks that survived summary disposition are being appealed. In a cross-appeal by plaintiff that spans both docket numbers, plaintiff challenges the dismissal of TII and most of the dismissed claims associated with the other defendants.

We have conducted an exhaustive review of the record, carefully scrutinizing the mountain of documentary evidence that was presented to the trial court. We have familiarized ourselves with the particulars of each and every count in plaintiff's complaint, with the dimensions of the trial court's rulings on those counts relative to the motions for summary

¹ The last seven officers listed, going back to and including Brechelsbauer, are all Saginaw County correctional and police officers, as is Fresorger. Officer Hendricks was employed by Carrollton Township, while officer Laux was employed by Zilwaukee. The evidence indisputably showed that Fresorger was not at the sallyport when the altercation occurred at that location.

² "Taser" is a trademarked corporate name for an electromuscular incapacitation device manufactured by TII. "Taser," as that term is widely used in today's culture, has become synonymous with such devices; therefore, for purposes of this opinion, we shall simply refer to "taser" in the generic form, for the most part, when speaking of electromuscular incapacitation devices.

disposition, with the full extent of the appellate arguments, and with the applicable caselaw and statutory authorities.

With respect to count I, gross negligence, assuming that the trial court erred by dismissing this count pursuant to MCR 2.116(C)(8), we hold that the gross negligence claim fails as a matter of law under MCR 2.116(C)(7) and MCR 2.116(C)(10), where the officers' response and conduct at the apartment and sallyport, which entailed the use of force, a taser, and pepper spray, did not constitute "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."³ MCL 691.1407(7)(a); *Odom v Wayne Co*, 482 Mich 459, 479-480; 760 NW2d 217 (2008). Thompson, throughout both altercations, was defiant, uncooperative, acting in a bizarre and physically uncontrollable manner, resistant, evasive, and he displayed a readiness and willingness to use all of his physical strength to avoid detainment, including kicking and clawing officers. He posed a danger. Viewing the evidence in a light most favorable to plaintiff, it *might* be arguable that the conduct of the officers was negligent, but it cannot be found that they acted in a grossly negligent manner.

With respect to count II, assault and battery, and assuming that the police officers used an unreasonable amount of force to effectuate the arrest or detainment of Thompson, whether at the apartment or sallyport, we hold that, as a matter of law, the officers acted or reasonably believed that they were acting within the scope of their authority, their acts were discretionary, and that they acted and conducted themselves in good faith, with an absence of malice. *Odom, supra* at 479-480; *Delude v Raasakka*, 391 Mich 296, 302; 215 NW2d 685 (1974); *Young v Barker*, 158

³ Under MCR 2.116(C)(7), summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id.* The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.* This Court must consider the documentary evidence in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Under MCR 2.116(C)(10), the pleadings, affidavits, admissions, and other evidence is viewed in a light most favorable to the nonmovant in determining whether there exists a genuine issue of material fact. *Odom, supra* at 466-467. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Odom, supra* at 466; *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). The question whether governmental immunity is applicable in a given case is one of law that is also reviewed de novo on appeal. *Bennett v Detroit Police Chief*, 274 Mich App 307, 310-311; 732 NW2d 164 (2007).

Mich App 709, 723; 405 NW2d 395 (1987); *White v City of Vassar*, 157 Mich App 282, 293; 403 NW2d 124 (1987); *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984). We reach this conclusion on the basis of Thompson's actions and behavior as outlined above. In regard to the initial deployment of the taser in the sallyport, although there was some evidence that Thompson was in the grasp of two officers and being pinned against a police cruiser, the evidence also indisputably established that Thompson was still struggling to free himself, thrashing about and kicking. Although handcuffed and in the enclosed sallyport, Thompson's out-of-control, dangerous, and resistant behavior provided a basis to deploy the taser. This behavior was also ongoing when the pepper spray was applied inside the sallyport. As to the total amount of taser deployments at the apartment and sallyport, it is clear that, while the taser was activated at the apartment several times, the dart probes had not hit their mark, leaving Thompson unaffected. After being tasered in the sallyport, Thompson would momentarily act as if he would become compliant, only to renew his physical struggle against the officers when they attempted to take control of Thompson. When the altercations occurred in August 2003, TII had not yet distributed its bulletin warning of the need to use special care in deploying the taser, especially multiple firings, against persons exhibiting excited delirium, and there was no evidence that Laux was aware, at that time, of literature speaking of the potential dangers associated with tasing subjects exhibiting delirium. There is a dearth of evidence showing bad faith or malice by Laux or any of the officers. Accordingly, governmental immunity demands summary dismissal of the assault and battery count. We would also note that, even if deployment of the taser, standing alone, was unreasonable and constituted bad faith, a causal connection to the death was not established as a matter of law for the reasons discussed *infra* in resolving the products liability claim.

With respect to count III, excessive force, and assuming that there was a constitutional violation under the Fourth Amendment, whether at the apartment or sallyport, we hold that, as a matter of law, the particular conduct exercised by the police officers did not constitute a clearly established constitutional violation, meaning that it would not be clear to a reasonable officer that the conduct was constitutionally offensive under the circumstances and in the situation that the officers were confronting. *Pearson v Callahan*, __ US __; 129 S Ct 808, 815-816; 172 L Ed 2d 565 (2009); *Saucier v Katz*, 533 US 194, 202-206; 121 S Ct 2151; 150 L Ed 2d 272 (2001), overruled in part on other grounds in *Pearson, supra*; *Graham v Connor*, 490 US 386, 394-397; 109 S Ct 1865; 104 L Ed 2d 443 (1989). Once again, Thompson, throughout both altercations, was defiant, uncooperative, acting in a bizarre and physically uncontrollable manner, resistant, evasive, and he displayed a readiness and willingness to use all of his physical strength to avoid detainment, including kicking and clawing officers. Our discussion above, in the context of addressing the assault and battery claim, concerning the initial taser deployment in the sallyport, the use of pepper spray in the sallyport, and other associated matters applies equally to the excessive force claim. Accordingly, qualified immunity demands summary dismissal of the excessive force count.⁴

⁴ The excessive force count also encompassed the county, township, and city, along with their police departments and police chiefs. We first note that the trial court ruled that the police departments are not entities that can be separately sued, and plaintiff does not present an
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With respect to count IV, deprivation of constitutional privacy rights in stripping Thompson while in the jail cell, the court dismissed the claim, and plaintiff does not appeal the dismissal. Accordingly, we affirm the dismissal.

With respect to count V, deliberate indifference to Thompson's medical needs in violation of the Eighth and Fourteenth Amendments brought pursuant to 42 USC 1983, we hold that, as a matter of law, the evidence falls woefully short of showing that the police acted in reckless disregard of a substantial risk of serious harm; there was no failure to act, no intentional delay, and no denial of access to medical care when medical attention became necessary. *Farmer v Brennan*, 511 US 825, 842-844; 114 S Ct 1970; 128 L Ed 2d 811 (1994); *Estelle v Gamble*, 429 US 97; 97 S Ct 285; 50 L Ed 2d 251 (1976); *Morden v Grand Traverse Co*, 275 Mich App 325, 333-334; 738 NW2d 278 (2007). After the apartment altercation, Thompson did not exhibit symptoms of being in physical pain or distress, nor did he exhibit such symptoms after the sallyport altercation, but before reaching the jail cell. When his breathing became labored and it was evident that Thompson was in distress once in the jail cell, the officers did not ignore the matter and go on about their day. Rather, jail nurses were immediately contacted, as were outside emergency medical personnel, and the officers repositioned Thompson in an effort to make it easier for him to breathe. Nurses arrived in a matter of a few minutes and provided emergency care. We find that the officers responded reasonably, despite the fact that the ultimate outcome was not averted. *Farmer, supra* at 844. But to the extent that the officers should have taken life-saving steps, e.g., CPR, moments before the first nurse arrived, the most that can be said is that the officers were negligent, which does not suffice. *Morden, supra* at 333-334. There was no deliberate indifference to Thompson's medical needs. We also note that Dr. Virani testified that it was essentially too late to do anything that would have been medically helpful at the point in which Thompson collapsed. Further, because the officers were not deliberately indifferent to Thompson's medical needs, there can be no liability on the basis of customs, policies, and procedures with respect to the remaining defendants. *Collins v City of Harker Heights, Texas*, 503 US 115, 123; 112 S Ct 1061; 117 L Ed 2d 261 (1992); *Monell v New York City Dep't of Social Services*, 436 US 658, 690 n 54, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978); *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000); *Blackmore v Kalamazoo Co*, 390 F3d 890, 900 (CA 6, 2005).

With respect to count VI, conspiracy, we hold that, as a matter of law, the claim necessarily fails to the extent that it was based on the underlying wrongs of assault and battery and excessive force, given our rejection of those claims, and, regardless, the entire claim fails because there simply was no evidence of an express or implied agreement or of a preconceived plan. *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992); *Temborius v Slatkin*, 157 Mich App 587, 599-600; 403 NW2d 821 (1986); *Pfamstiel v City of Marion*, 918 F2d 1178, 1187 (CA 5, 1990). The actions of the police officers cannot reasonably

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argument to the contrary. Therefore, we affirm dismissal of the police departments on all counts applicable to them. With respect to the municipalities and county, and the police chiefs and sheriff, plaintiff presents no appellate arguments challenging dismissal of the excessive force claims as to these parties; therefore, we affirm dismissal of said claims. Further, because we found no liability on the assault and battery and excessive force claims in regard to the officers, there can be no basis to hold the other defendants liable.

be construed as reflecting conspiratorial conduct. Accepting as true, evidence of a nearly instantaneous response of the officers moving away from Thompson when Laux indicated an intent to deploy the taser in the sallyport, it would not constitute sufficient evidence of a conspiracy, nor would it be reasonable to infer a conspiracy based on that conduct. Rather, the evidence merely showed instinctive, reactionary conduct in a fast-moving and ever-evolving situation, demanding quick action and hastened judgment calls. With respect to an alleged conspiracy in drafting reports and in giving deposition testimony, the argument fails because it is fatally undeveloped in plaintiff's brief and because inconsistencies in the reports and testimony was the norm, not the exception. The trial court did not err in dismissing the conspiracy claim.

With respect to counts VII, VIII, and IX, which all related to the training and supervision of police officers relative to the safe use of tasers and handling subjects who have been tasered, we hold that the claims fail as a matter of law, and, additionally, plaintiff fails to adequately brief the appellate arguments being raised. There is inadequate elaboration concerning existing policies and in what manner any policy (implemented, insufficiently implemented, or unimplemented) should address and answer the questions of how to use a taser, how to handle tasered subjects, and what medical care should be provided a taser victim, let alone explain the causal connection between policies, or lack thereof, and Thompson's death. As our Supreme Court so eloquently stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

“It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.”

Further, Zilwaukee was the only municipality using tasers at the time of the incident, and assuming they had inadequate policies or procedures, plaintiff fails to argue or cite documentary evidence with respect to establishing the requisite causal connection to Thompson's death. *Payton v Detroit*, 211 Mich App 375, 400; 536 NW2d 233 (1995). Additionally, we agree with and adopt the reasoning articulated by the trial court in rejecting the training claims. Plaintiff makes no effort to challenge the particulars of the court's ruling. Laux and King were trained on how to use a taser, they were certified taser handlers, and they became taser trainers. The county and the township lacked taser policies and procedures because they did not use tasers at the time. To the extent that they arguably should have had policies and procedures in place on the chance of taser issues arising because of joint crime-fighting efforts with Zilwaukee or other taser-carrying municipalities, the failure to do so hardly reflects a deliberate indifference to the constitutional rights of citizens who might interact with county and township officers. *Payton, supra* at 400. And as the trial court noted, without contradiction, the county had general policies in place in regard to handling injured or sick detainees, and plaintiff fails to explain why these policies were insufficient to address an injured taser victim.

Finally, with respect to count X, the products liability and failure to train claims brought against TII, we hold that, as a matter of law, plaintiff failed to establish the requisite proximate cause between the taser use and Thompson's injuries and death.

“A prima facie products liability case consists of proof (1) that the defendant has supplied a defective product and (2) that this defect has caused injury to the plaintiff.” *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 249; 492 NW2d 512 (1992), overruled in part on other grounds in *Buckler v Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007). The threshold requirement is the identification of the injury-causing product and its manufacturer. *Abel v Eli Lilly & Co*, 418 Mich 311, 324; 343 NW2d 164 (1984). In the context of a products liability action premised on a breach of implied warranty of fitness, it must be proven that the product was defective at the time the product left the defendant’s control, and a defect exists when a product is not reasonably fit for its intended, anticipated, or reasonably foreseeable uses. *Gregory v Cincinnati*, 450 Mich 1, 34; 538 NW2d 325 (1995); *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 396; 628 NW2d 86 (2001).

A products liability action is defined as “an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property *caused by or resulting from* the production of a product.” MCL 600.2945(h) (emphasis added). Therefore, Thompson’s injuries and death must have been caused by or resulted from the production and use of the taser in order for plaintiff to recover. In Michigan, causation actually entails two separate elements, which are cause in fact and legal cause, i.e., proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994) (products liability case). “The cause in fact element generally requires showing that ‘but for’ the defendant’s actions, the plaintiff’s injury would not have occurred.” *Id.* at 163. Circumstantial evidence can establish causation if it facilitates reasonable inferences of causation, not mere speculation or impermissible conjecture. *Id.* at 163-164. The *Skinner* Court explained the distinction:

“As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.” [*Id.* at 164 (citation omitted).]

A mere possibility of causation is not enough; rather, a plaintiff must introduce evidence that affords a reasonable basis to conclude that it is more likely than not that the complained of conduct was a cause in fact of the injury. *Id.* at 165.

In *Mascarenas*, *supra* at 250, this Court, examining the issue of proximate cause in a products liability suit, stated:

Liability does not attach unless an actor's negligent conduct is a proximate or legal cause of the harm suffered. An indispensable element of a products liability case is proof that the manufacturer's alleged negligence proximately caused the plaintiff's injury. When a number of factors contribute to produce an injury, one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in producing the injury. Products liability actions grounded in negligence require a causal connection between the

manufacturer's negligence or product defect and the plaintiff's injury. [Citations omitted.]

Here, it appears indisputable that a taser causes muscle contractions, which in turn can lead to an increase in lactic acid and a lowering of blood serum pH levels. A buildup of lactic acid, accompanied by an inability of the body to timely and sufficiently rid itself of the acid, ultimately has the potential of causing harm and death by way of metabolic acidosis, especially in more susceptible individuals, such as those with existing health problems. A healthy person can withstand more muscle activity because of his or her body's ability to better filter out the lactic acid. Further, with a person exhibiting excited delirium, caused either by drugs or mental illness, current literature suggests that tasering presents an increased danger because of the intense and out-of-control exertion, which, like any physical activity, increases lactic acid. Here, contrary to plaintiff's argument, there were two intense, and fairly lengthy, physical struggles involving Thompson, which necessarily entailed muscle contraction and exertion to some extent, and thereby increased his lactic acid levels. It was Thompson's resistance that led to the exhausting physical tussles. The affidavits of Drs. Dragovic and Ordog, along with the deposition testimony of Dr. Virani, support our findings above. So the situation that presented itself was one in which the taserings, in conjunction with the physical exertion, as well as Thompson's already compromised health condition (arteriosclerosis and hepatitis), ultimately caused Thompson's death by metabolic acidosis.⁵ The problem with plaintiff's case, and as we read the trial court's opinion, is that plaintiff did not submit documentary evidence that quantified the lactic acid effect in Thompson's system attributable solely to the taser. Therefore, it would be impossible to conclude one way or the other whether the taser had anything to do with Thompson's death. Improper speculation would be necessary. Plaintiff cannot establish that "but for" use of the taser, Thompson's death would not have occurred. We recognize that there can be more than one proximate cause, but it needs to be shown that whatever cause or conduct is being alleged, there must be a reasonable basis to conclude that it is more likely than not that the complained of conduct was a cause in fact. Without evidence that quantifies the level of effect that the taserings had on Thompson's lactic acid levels, even though it is a given that it had some effect, plaintiff cannot show "but for" causation. Had there been no physical struggle or exertion by Thompson, followed by a tasering, and with the same outcome of death by metabolic acidosis occurring, we think that a reasonable inference could be that the death was causally connected to the taser use, thereby allowing a jury to resolve the matter. We do not have that situation here. The medical and scientific evidence is lacking. Contrary to plaintiff's argument, Dr. Virani's deposition testimony does not help plaintiff's case on causation, where, while acknowledging that tasering can cause muscle contraction and a buildup of lactic acid, Virani could not quantify the taser's effect. He testified as follows:

Q. Would you agree that the Taser would have had some impact on his condition of metabolic acidosis?

⁵ Plaintiff's experts also averred that use of the pepper spray played a role in causing death, although Dr. Virani opined that the pepper spray was irrelevant to the manner and cause of death.

- A. It very well could have created it — enhanced the situation, yes, but I cannot separate which part came from his own physical activity and which part came from the Taser effect. I cannot separate it.

The affidavits of the doctors submitted by plaintiff do not provide any assistance either in this case. They averred:

1. That Mr. Thompson did not die of natural causes, but as a result of the events occurring on August 6 and 7, of 2003, which included physical confrontation with application of pepper spray and applications of a taser weapon;

2. That Mr. Thompson's condition of respiratory and metabolic acidosis causing his death were primarily due to him being exposed to the above listed force and injuries, including multiple firings from the taser weapon; and

3. That Mr. Thompson did not have any identified pre-existing condition that would have caused his death independently of the forces listed above at the time and place that it occurred.

These averments blame a combination of the physical confrontation, the pepper spraying, and the taser as the cause of death, but there is nothing in these averments that separates out or quantifies the effect of the taser. On the evidence presented, one cannot answer, without resort to speculation, the question of whether Thompson would have lived absent use of the taser. There is no “but for” averment relative to the taser alone.⁶ Accordingly, we affirm the court's ruling on causation. This effectively also defeats plaintiff's accompanying failure to warn and supervise claim.

Plaintiff argues that summary disposition on the claim against TII was premature because of outstanding discovery requests and because a noticed deposition of Dr. Dragovic had not yet taken place. We conclude that plaintiff could have obtained more information from Dr. Dragovic on her own, without waiting for a deposition noticed by TII, considering that Dragovic was her expert witness. And we do not see how further discovery, as cursorily argued by plaintiff, stands a reasonable chance of uncovering factual support for plaintiff's position. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003); *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

Finally, with respect to plaintiff's argument that a *Daubert*⁷ hearing was necessary, the trial court concluded, in regard to the identical affidavits of plaintiff's experts, that the affidavits did nothing to advance plaintiff's causal theory and actually supported TII's theory of the cause

⁶ Also, as argued by TII, we question whether the affidavits, with their conclusory findings and lack of detail as to factual and scientific bases and methodology, are proper to consider under MRE 702 and MCL 600.2955.

⁷ *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

of death. Because the trial court accepted and considered the affidavits as if they were admissible and did not strike them, there was no basis to hold a *Daubert* or evidentiary hearing. See *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597; 705 NW2d 703 (2005), lv den in part, aff'd in part on other grounds 477 Mich 1067 (2007).

Affirmed in part, reversed in part, and remanded for entry of judgment in favor of all defendants. We do not retain jurisdiction. Taxable costs to defendants pursuant to MCR 7.219.

/s/ Stephen L. Borrello

/s/ William B. Murphy